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Insurance

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By Maximilian A. Pock*

In order to provide desirable continuity and to facilitate cross-referencing this survey will generally conform to the overall organization of past surveys and use identical categories and chapter headings. Where certiorari has been denied or applied for but not disposed of during the survey period, this will be so indicated in the footnotes.

I. Legislation

The Uninsured Motorist Act[1] was amended to provide that vehicles are deemed *uninsured* to the extent that they carry coverages with liability limits below those found in the uninsured motorist endorsement of the insured.[2] This allows the cautious insured who has troubled to buy optional uninsured motorist coverage beyond the statutory minimum to reduce losses caused by "underinsured" motorists by recovering from his own insurer the difference between his uninsured coverage and the liability coverage of the tortfeasor. Prior law incongrously restricted the recovery of such insured to the difference between the *statutory* minimum for uninsured motorist coverage and the liability coverage of the tortfeasor.[3]

The Motor Vehicle Accident Reparations Act,[4] Georgia's version of "no fault" automobile insurance, was amended for the thirteenth time since its passage in 1974. The amendment is a modest one. It allows municipalities to classify violations of the Act, which are crimes against the state, as "local" offenses by making them the subject matter of municipal ordinances.[5]

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1. Ga. Code Ann. § 56-407.1 (Supp. 1979).
2. 1980 Ga. Laws 1428.
3. *See* Pock, *Insurance, Annual Survey of Ga. Law*, 30 Mercer L. Rev. 105, 121 (1978).
4. Ga. Code Ann. ch. 56-34B (1977).
5. 1980 Ga. Laws 1431.

The 1980 Georgia General Assembly also contributed to the nationwide consumerist trend toward making accident and sickness insurance one of the most pervasively regulated fields of insurance law. Purveyors of accident and sickness policies that are designed primarily to supplement federal "medicare" or state "medicaid" will now be required to provide reasonable economic benefits in relation to the premium paid and to this end will be subjected to close scrutiny in regard to policy content and business gathering methods.[6] Neither individual nor group accident or health insurance policies that are offered for sale in Georgia may in the future contain a provision for terminating a spouse's coverage under the policy solely because of "a break in the marital relationship except by reason of entry of a valid decree of divorce between the parties."[7] In case of divorce the formerly covered spouse must be given conversion privileges without evidence of insurability.[8] Contracts of accident and sickness insurance that provide coverage for services *within the scope* of a licensed chiropractor[9] or a licensed applied psychologist[10] must now provide that reimbursements are payable regardless of whether such services are performed by a doctor of medicine, a chiropractor, or an applied psychologist respectively. Similarly, contracts of accident and sickness insurance which provide coverage for certain medical and surgical procedures when performed on an *inpatient basis* must now, under specified conditions, extend such coverage to identical services when performed on an *outpatient basis*.[11]

"Property insurance," in the form of service or extended warranty agreements on motor vehicles and family residential building structures, that is issued by a party other than the insurer, so that the holder must make claim in the first instance against the issuer, will have to provide that "the holder shall be entitled to make a *direct* claim against the insurer after failure of the issuer to pay any claim within 60 days after proof of loss."[12]

Property and casualty insurers are now prohibited from cancelling, modifying, or failing to renew policies *"solely* because the applicant or insured or any employee is either *mentally* or *physically impaired."*[13]

The remaining enactments of the 1980 Georgia General Assembly are of a technical-administrative character and, hence, of limited interest.

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6. *Id.* at 1266.
7. *Id.* at 1393.
8. *Id.* at 1393-94.
9. *Id.* at 1279.
10. *Id.* at 1249-50.
11. *Id.* at 1252.
12. *Id.* at 761 (emphasis added).
13. *Id.* at 1011-12 (emphasis added).

They include amendments relating to certificates of authority, fee payment deadlines, licensure of agents,[14] and regulation of reinsurance placed with foreign and alien insurers.[15]

II. Construction and Definitions

A. *Additional Automobile*

In *Preferred Risk Mutual Insurance Co. v. Miles*,[16] an automobile liability policy covered a "replacement" automobile defined as "a private passenger, farm or utility automobile of which the named insured acquires ownership, provided it replaces the owned automobile"[17] and an "additional" automobile defined as "an additional private passenger, farm or utility automobile of which the named insured acquires ownership, provided notice of its delivery be given to the company within 30 days following the date of its delivery."[18] The insured's Pontiac was damaged in an accident and, although it was never repaired or returned to service, the insured did not part with it. Some time after the accident the insured's husband bought her a Plymouth and the insurer was promptly notified of its acquisition. It was held that the Plymouth, although failing to qualify as a "replacement" automobile because ownership in the "replaced" car had continued in the insured, did qualify as an "additional" automobile as the policy itself defined that term.

B. *Forgery*

"Tillie, the All-Time Teller Card" was issued (unsolicited) to an insured homeowner to allow her to withdraw funds from her bank accounts at any time. The card operated much like a check, except that "[i]nstead of requiring the signature of the drawer to authorize the withdrawal of funds, a recording of the personal identification number of the drawer-cardholder [was] necessary to validate the withdrawal of funds from the cardholder's account."[19]

The card was stolen and the thief, by recording the victimized owner's personal identification number, unlawfully directed the bank to pay him a sum certain in money. Was this theft of the bank card, which resulted in an aggregate monetary loss of $9,900, covered in full under the policy's general *theft* provision for unscheduled personal property or was it cov-

14. *Id.* at 1163.
15. *Id.* at 1108.
16. 152 Ga. App. 744, 263 S.E.2d 708 (1979).
17. *Id.* at 745, 263 S.E.2d at 709.
18. *Id.*
19. Allstate Ins. Co. v. Renshaw, 151 Ga. App. 80, 82, 258 S.E.2d 744, 746 (1979).

ered only for a maximum of $1,000 under its *forgery* provision?

The court in *Allstate Insurance Co. v. Renshaw*[20] held, as a matter of law, that the loss had not resulted from a theft but from a forgery. In the absence of a definition in the policy itself, the court applied the definition of forgery found in the criminal code, which in pertinent part states that "a person commits forgery . . . when, with intent to defraud, he knowingly *makes,* alters or possesses *any writing* in a fictitious name or *in such manner that the writing as made or altered purports to have been made by another person* . . . . "[21] It also applied the definition of "writing" as found in the criminal code which includes, but is not limited to, "printing or *any other method of recording information,* money, coins, tokens, stamps, seals, credit cards, badges, trademarks and other symbols of value, right, privilege, or identification."[22]

C. Household

Can two people live fifteen miles apart and still be residents of the same household as that term is used in omnibus clauses and uninsured motorist riders? According to the court in *State Farm Mutual Automobile Insurance Co. v. Gazaway,*[23] the answer may be a qualified yes! The uncontested facts were that a husband and wife, while married at the time of an automobile accident, had been residing apart in separate mobile homes for about seven years. There was evidence of marital discord, but they were never divorced nor legally separated and neither of these legal conditions was under consideration. The homes were about fifteen miles apart. Their children stayed with the wife during the week and the husband almost every weekend. The home in which the wife lived was titled in the name of the husband. The husband paid the wife a regular weekly allowance for her and the children's support and in addition "picked up" her utility and medical bills which would often come to him in the mail. The couple filed joint income tax returns and the husband's hospitalization policy listed the wife as beneficiary.

These uncontradicted facts did not, as a matter of law, establish that the wife had ceased being a member of the husband's household. In holding that a jury question was presented, the court of appeals shifted from an earlier definition of household as "a collective body of persons who live in one house or within the same curtilage and under one head or management"[24] to a more recent definition of household as "a domestic establish-

20. 151 Ga. App. 80, 258 S.E.2d 744 (1979).
21. GA. CODE ANN. § 26-1701 (1977) (emphasis added).
22. GA. CODE ANN. § 26-1703 (1977) (emphasis added).
23. 152 Ga. App. 716, 263 S.E.2d 693 (1979), *petition for cert. filed.*
24. *Id.* at 720, 263 S.E.2d at 696.

ment under a single management."[25] The court concluded that in this time of mobility and diversified lifestyle this more recent definition was a more accurate reflection of the intent of the legislature in mandating residence in the household of the insured as the touchstone of certain coverages.[26]

D. Reasonable Proof

The Georgia Motor Vehicle Accident Reparations Act provides that no-fault benefits "are overdue if not paid within 30 days after the insurer receives *reasonable proof* of the fact and the amount of loss sustained."[27] In *State Farm Mutual Insurance Co. v. Moss*[28] the court held that, as the statute did not define *reasonable proof* in any way, the court had to turn to cases decided under tort law for guidance. Thus, a plaintiff seeking no-fault benefits for lost wages, who was paid by the job rather than by the hour, had to produce evidence to show that he had jobs waiting for him at the times he was unable to work, what they were, and that he did not have the opportunity later to do these jobs.[29]

E. Sessions or Visits for all Outpatient Treatment

A health policy covering psychiatric services limited benefits to "a total of 20 *sessions* or *visits* for all outpatient treatment . . . per covered person per calendar year . . ."[30] without defining what it meant by "sessions" or "visits." When the insured filed a claim, the insurer denied a portion of it on the grounds that some of the individual visits for which reimbursement was sought exceeded an hour and the group sessions exceeded ninety minutes.

Was it proper to establish the contractual signification of *sessions* and *visits* by expert medical testimony that it was commonly understood and recognized within the medical profession, and in the specialty of psychiatry in particular, that the term "session" referred to a period of time from 50 to 90 minutes and the term "visit" referred to a period of time from 50 to 60 minutes? The court in *Fillion v. Aetna Casualty & Surety Co.*[31]

25. *Id.*

26. It is peculiar that in formulating this "modern" definition the court relied in part on the "ancient" notion that the husband was the *head of the household* and thus empowered to fix the family domicile, a notion which is embedded in the Georgia Code. *See* GA. CODE ANN. § 53-501 (1974).

27. GA. CODE ANN. § 56-3406b(b) (1977) (emphasis added).

28. 152 Ga. App. 84, 262 S.E.2d 248 (1979).

29. *Id.* at 85, 262 S.E.2d at 249.

30. Fillion v. Aetna Cas. & Sur. Co., 150 Ga. App. 619, 619, 258 S.E.2d 222, 223 (1979) (emphasis added).

31. 150 Ga. App. 619, 258 S.E.2d 222 (1979).

held that these words were no more technical than common words such as "road." In the absence of any indication in the contract that they were used in a narrow technical sense, the insured had the right to place upon them their usual, natural, and ordinary interpretation, which was not subject to modification by opinions of so-called experts.

F. Use of a Motor Vehicle

In *Georgia Farm Bureau Mutual Insurance Co. v. Nelson*,[32] the driver of a tractor-trailer "rig" was killed when a cargo of lumber loaded upon the trailer shifted and fell on him. At the time of his death, the driver had been in the process of jacking up the loaded trailer and reconnecting it to the tractor. Did his death arise out of the "operation, maintenance or *use of a motor vehicle as a vehicle*"[33] as defined by the Motor Vehicle Accident Reparations Act?

The court conceded that a trailer incapable of self-propulsion and standing unattached to any means of propulsion was not a motor vehicle, but it noted that the definition of motor vehicle specifically included "a trailer drawn by or attached to such a vehicle"[34] which meant that the tractor-trailer "rigs" were motor vehicles. Even if the trailer had not yet become reconnected to the tractor and thus had not yet become a motor vehicle within the intendment of the statute, the process of connecting or reconnecting the trailer, which resulted in the driver's death, was part of the *normal use of the tractor as a motor vehicle* and therefore an activity covered under the statute.

G. Wrongful Entry or Eviction

In *Cincinnati Insurance Co. v. Davis*,[35] the insured held a comprehensive general liability or "umbrella" policy which obligated the insurer to pay on behalf of the insured all damages because of an "accident" resulting in property damage "neither expected nor intended from the standpoint of the insured"[36] and which excluded coverage while that property was "in the care, custody or control of the insured or as to which the insured was for any purpose exercising physical control."[37]

The insured had also purchased several scheduled underlying policies for specific coverages that formed a part of the "umbrella" policy. One of these extended coverages for injuries arising out of one or more "offenses"

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32. 153 Ga. App. 623, 266 S.E.2d 299 (1980), *petition for cert. filed.*
33. GA. CODE ANN. § 56-3402b(h) (1977) (emphasis added).
34. GA. CODE ANN. § 56-3402b(a) (1977).
35. 153 Ga. App. 291, 265 S.E.2d 102 (1980), *petition for cert. filed.*
36. *Id.* at 292, 265 S.E.2d at 104.
37. *Id.*

committed in the conduct of the insured's somewhat friction-prone business; these included "*wrongful entry or eviction* or other invasions of the right to private occupancy."[38] The policy contained no references to "accidents" or exclusionary language regarding property in the care of the insured.

The insured obtained a dispossessory warrant against one of his tenants for delinquency in rental payments and through his agent removed some of the tenant's television sets from the leased warehouse and stored them in one of his other warehouses for safekeeping. It turned out that the eviction was deficient because of improper service of notice which resulted in the taking and safekeeping of the sets being classified as a conversion. It was held that this conversion, which was purely technical in that it did not result from a deliberate trespass without color of right, *arose out of a wrongful entry or eviction* and was, therefore, covered under the scheduled policy forming a component of the "umbrella" policy. The coverages and exclusions of the scheduled underlying policies, which were specifically tailored to accomodate varied and diverse interests, superseded conflicting language in the "umbrella" policy. Hence, the insurer's contentions that the conversion was not an "accident" because it was intended by the insured and that the liability arose while the insured was in physical control of the sets and was therefore specifically excluded were rejected.

III. General Considerations

A. *Agent, Notice to*

In *Barnes v. Mangham*,[39] a signed application for automobile insurance showed that uninsured motorist coverage was rejected by the applicant. The court noted that "[t]he fact of this rejection [was] also reflected on the policy's declaration sheet, which contain[ed] a further indication that no premium was charged for that coverage."[40] Some three months after issuance of the policy, the insured had a collision with an uninsured motorist. She testified in her deposition that she had not read the policy *until after the accident*, that she had signed the application in blank, that she had requested the insurer's agent to provide her with "full coverage" and that the agent has assured her that she would indeed receive "full coverage." It was held that the insured's deposition showed that she had been given ample opportunity to read the policy and to reject it as written or to renegotiate it with the insurer if the coverage requested was

38. *Id.* at 293, 265 S.E.2d at 104 (emphasis added).
39. 153 Ga. App. 540, 265 S.E.2d 867 (1980).
40. *Id.* at 540, 265 S.E.2d at 868.

not in fact tendered. She had thus failed to perform her "duty to read the policy."[41] Hence, a summary judgment for the insurer was justified.

This decision is in keeping with the trend to hold that the insured is bound by the contract as written, whether the insured has read it or not.[42] Yet it is strangely at odds with other areas of consumer law where a failure to read recondite contracts of adhesion is readily forgiven.[43]

B. Application — Misrepresentation

Georgia Insurance Department regulations governing assigned risk plans provide that subscriber insurance companies "shall not be required to afford or continue insurance . . . if any person who usually drives a motor vehicle does not hold . . . an *operator's license.*"[44] Is an applicant for insurance under the assigned risk plan guilty of a misrepresentation making the policy *void ab initio* if, without notice or knowledge that his license had in fact been suspended, he states in the application that he held a valid operator's license? The court in *Virginia Mutual Insurance Co. v. Hayes*[45] held that he well might be. Knowledge of the falsity of the representation is irrelevant; the only issue is the representation's materiality to the risk, which poses a question of fact for the jury.

In a cognate case an applicant for automobile insurance stated in the application that "no driver or member of the household in the past five years had been convicted of or forfeited bail for any traffic violation."[46] A later investigation revealed that the applicant had been guilty of several moving traffic violations during the period in question. *Sentry Indemnity Co. v. Brady*[47] held that the insurer was entitled to a declaratory judgment that the policy was *void ab initio* on a showing that, had the true information about the applicant's driving record been known, the premium would have been greater than the premium for which the policy was in fact issued.

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41. This is really a misnomer. If there were such duty its breach would be liability creating. Conceptually, it is really a condition of the insurer's liability which, like all conditions, may be enforced by forfeiture. The insurer thus may have a defense in an action brought *by* the insured, rather than a cause of action *against* the insured.

42. A trend noticed by Professor Vance as many as thirty years ago. W. VANCE, HANDBOOK ON THE LAW OF INSURANCE (3rd ed. 1951).

43. Occasionally one finds cases even in insurance law where this is the case, or where, after lip service is paid to the duty to read, the insured is treated with great solicitude. *See, e.g.*, Harr v. Allstate Ins. Co., 54 N.J. 287, 255 A.2d 208 (1969) (treating the agent's statements as an inception-estoppel to extend the coverage provided by the delivered policy).

44. Regulation 120-2-14-.09(3) on file in the office of the Comptroller General in accordance with GA. CODE ANN. § 3A-124 (1975) (emphasis added).

45. 150 Ga. App. 756, 258 S.E.2d 617 (1979), *petition for cert. filed.*

46. Sentry Indem. Co. v. Brady, 153 Ga. App. 168, 168-69, 264 S.E.2d 702, 703 (1980).

47. 153 Ga. App. 168, 264 S.E.2d 702 (1980).

Georgia Farm Bureau Mutual Insurance Co. v. First Federal Savings & Loan Association of Statesboro[48] reads like an ALR annotation on a mortgagee-loss payee's duty to disclose to the insurer facts bearing upon the risk assumed. The focal point of the controversy was a certain homeowner's policy which was issued to the mortgagor-insured and later reinstated after cancellation for nonpayment of premiums. The mortgagee-loss payee,[49] seeking to avoid a lapse of coverage occasioned by cancellation of a prior policy, helped in securing the issuance of the policy in question and its later reinstatement by promising that it would pay the premium if the insured did not. It was never called upon to keep those promises because the insured himself paid the premium in cash. After a fire causing the total loss of the insured's dwelling, the insurer sought to avoid the policy, as against the mortgagee, on the grounds that its failure to inform the insurer that the mortgagor-insured was in default on his mortgage payments at the time the policy was issued constituted inceptive fraud. The court held that, even assuming such factor to be material in fact, the insurer could not assert its materiality unless it made an inquiry about it and received a misstatement in response or *apprised* its prospective insured of its materiality and was met with deliberate silence. The court also found that the mortgagee's help in securing issuance and reinstatement of the policy in question was solely prompted by a natural desire to protect its own interest. The mortgagee was not acting as an agent on behalf of the insured or as a fiduciary in relation to the insurer.

The insurer then claimed that the mortgagee had forfeited coverage by failure to comply with a policy provision requiring notification of the insurer "of any change in ownership, occupancy or substantial *change in risk* of which the mortgagee is aware."[50] The court held that such duty to notify did not arise until after issuance of the policy and was at any rate limited to "*risk[s] relative to the dwelling, not a financial risk involving the insured.*"[51]

The insurer finally claimed that the mortgagee had forfeited coverage by failing to submit a timely proof of loss. The policy, in language formally addressed to the named insured, stated that "If we deny your claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee: submits a signed, sworn statement of loss within 60 days after receiving *notice from us of your failure to do so.*"[52] It was undisputed that the insurer had only sent the mortgagee notice of the failure of the named insured to recover under the policy. This, the court held, did not

48. 152 Ga. App. 16, 262 S.E.2d 147 (1979).
49. The case does not disclose whether an open or union mortgage clause was involved.
50. 152 Ga. App. at 19, 262 S.E.2d at 150 (emphasis added).
51. *Id.* (emphasis added).
52. *Id.* at 20, 262 S.E.2d at 150-51 (emphasis added).

comply with the policy terms. The insurer should have sent the mortgagee notice of the insured's failure to submit a statement of loss within sixty days after request. Only such notice would have informed the mortgagee that it had sixty days in which to make a statement of its own.

C. *Attorney's Fees and Statutory Penalties*

What is the proper standard of review of a jury verdict for attorney's fees and penalties?[53]

In *Colonial Life & Accident Insurance Co. v. McClain*,[54] the supreme court essayed an answer to this vexing question certified to it by the court of appeals by stating:

> [W]e disapprove the rule that a finding of bad faith is not authorized if the evidence would have supported a verdict in accordance with the contentions of the defendant. This is an 'any evidence' rule being used to reverse a judgment. Such a rule virtually precludes a finding of bad faith and allows unreasonable defenses to delay payment with impunity. *The proper rule is that the judgment should be affirmed if there is any evidence to support it unless it can be said as a matter of law that there is a reasonable defense which vindicates the good faith of the insurer.*[55]

The salubrious effect of this decision cannot be overestimated.[56] It is bound to increase the number of cases where attorney's fees and penalties awards will stand the acid test of an appeal and to enhance their predictability.[57] During the current survey period, the court of appeals applied the test of *Colonial Life* on no less than five occasions and upheld the award of attorney's fees and penalties in all of them![58]

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53. GA. CODE ANN. § 56-1206 (1977).

54. 243 Ga. 263, 253 S.E.2d 745 (1979).

55. *Id.* at 265, 253 S.E.2d at 746.

56. One commentator, in a splendid piece on bad faith refusal to pay, concedes only that Colonial Life & Accident Ins. Co., 243 Ga. 263, 253 S.E.2d 745 (1979) reflects but "a trend toward a more sympathetic treatment of the bad faith remedy." *See Wrongful Refusal to Pay Insurance Claims in Georgia*, 13 GA. L. REV. 935, 936 (1979). This seems an excessively modest view of the situation.

57. Despite the supreme court's failure to answer the second certified question of whether the determination of the insurer's bad faith was a threshold question of law for the judge, or a factual question for the jury or both.

58. State Farm Fire & Cas. Co. v. Mills Plumbing Co., Inc., 152 Ga. App. 531, 263 S.E.2d 270 (1970), *petition for cert. filed;* Southern United Life Ins. Co. v. Nelson, 151 Ga. App. 798, 261 S.E.2d 742 (1979); Georgia Farm Bureau Mut. Ins. Co. v. Nelson, 153 Ga. App. 623, 266 S.E.2d 299 (1980), *petition for cert. filed;* Pennsylvania Millers Mut. Ins. Co. v. Dunlap, 153 Ga. App. 116, 264 S.E.2d 483 (1980), *petition for cert. filed.* Guarantee Trust Life Ins. Co. v. Davis, 143 Ga. App. 826, 256 S.E.2d 76 (1979) was reversed on the basis of the court of appeals' misreading of the trial record, Guarantee Trust Life Ins. Co. v. Davis, 244 Ga. 541, 261 S.E.2d 336 (1979). Allen v. National Liberty Life Ins. Co., 153 Ga. App. 579, 266

An assessment of penalties is not a condition precedent to an award of attorney's fees, but a finding of bad faith is. Thus, in *Hardin v. Fireman's Fund Insurance Co.*,[59] a jury award of attorney's fees of $5000 was found to be unauthorized because the jury had specifically stated in its verdict that "We find for the defendant no bad faith penalty."[60] Such negation of bad faith, although perhaps inadvertent, necessarily nullifies the award of attorney's fees.

McGhee v. Kroger Co.[61] raised the question whether a private employer could be held liable for attorney's fees and penalties because of a failure to pay or delay in paying compensation as ordered by the state board of workers' compensation. It was held that it could not because such liability was confined to insurers defined by the Code as "every person engaged as indemnitor, surety or contractor who issues contracts of insurance."[62]

D. Cancellation

The Georgia Code provides that notice of cancellation of an insurance policy "may be delivered in person, or by depositing such notice in the United States mails to be dispatched by at least first class mail to the last address of record of the insured and *receiving therefore the receipt provided by the United States Post Office Department.*"[63] Cases have construed this statute to compel strict compliance but have not demanded a talismanic use of form over substance. In *Travelers Indemnity Co. v. Guess*,[64] the supreme court explained that the cancellation methods adopted by the legislature were intended to assure actual notice of cancellation. Hence, the insured's own admission that he has *actually* received the notice will cure the insurer's incomplete attempts to use the postal service manifested in a failure to obtain the required post office receipt upon mailing the notice.[65] However, in the absence of actual receipt of notice, even irrefragable proof of mailing will not avail the insurer unless it can prove strict compliance by obtension of the required post office receipt.

S.E.2d 269 (1980), while citing *Colonial Life*, did not involve GA. CODE ANN. § 56-1206 (1977) but GA. CODE ANN. § 56-611 (1977) (penalties assessed against unauthorized insurers based on a refusal that is "vexatious and without reasonable cause").

59. 150 Ga. App. 277, 257 S.E.2d 300 (1979), *petition for cert. filed.*

60. *Id.* at 277, 257 S.E.2d at 301.

61. 150 Ga. App. 291, 257 S.E.2d 361 (1979).

62. GA. CODE ANN. § 56-103 (1977).

63. GA. CODE ANN. § 56-2430 (1977) (emphasis added).

64. 243 Ga. 559, 255 S.E.2d 55 (1979), *rev'g* Travelers Indem. Co. v. Guess, 148 Ga. App. 496, 251 S.E.2d 590 (1978).

65. *See* Pock, *Insurance, Annual Survey of Georgia Law*, 31 MERCER L. REV. 117, 122 (1979).

Does strict compliance with the mailing requirements effect cancellation if the insurer finds out that the notice had not in fact reached the insured? This interesting question was posed in *Favati v. National Property Owners Insurance Co.*[66] The insurer had properly mailed a notice of cancellation and subsequently a check for the return of the premium to what was indisputably the correct address of the insured. Thereafter, the unopened notice of cancellation was returned by the post office indicating, erroneously, that the notice could not be delivered because the addressee had moved and left no forwarding address. However, the check was received by the insured, endorsed personally by him and deposited to his account in the bank. The insured, relying upon language in *Travelers Indemnity*[67] to the effect that the statute was meant to assure actual notice of cancellation, contended that the cancellation was ineffective because he had not actually received it. The court of appeals read *Travelers Indemnity* more narrowly as merely placing upon the insurer the responsibility of taking adequate steps to do all within its power to assure that its insured was put on notice that insurance coverage had been cancelled. Notice by proper mailing was one permissible method of carrying out this responsibility because it was calculated to reach the insured. However, actual notice, while a *desideratum*, was not a condition precedent to an effective cancellation. At any rate, if notice was required, it was provided by the check which bore on its face statements, which by reasonable implication informed the insured, that the check represented a return of the premium and that his auto policy, identified by number, had been cancelled.

What constitutes a proper receipt provided by the post office? In *Favati*[68] the court held that a notice of cancellation, which had upon it a certificate by an employee of the insurer that she had delivered the notice to the post office and which had superimposed a stamp of the local post office showing the date, time, and place of delivery to the post office, qualified as a proper receipt despite the fact that the "stamp" was affixed without additional words specifically indicating "receipt." On a parity of reasoning, the court in *Hill v. Allstate Insurance Co.*[69] held that a "PORS" list (a computer compilation prepared in the ordinary course of business of the insurer containing names, addresses, and policy numbers of all those policyholders whose policies were to be cancelled) which was stamped by postal authorities to indicate receipt of the letters addressed to those persons appearing on the list also qualified as proper receipt.

The Georgia Code also requires that the insurer tender a return of the

66. 153 Ga. App. 723, 266 S.E.2d 359 (1980).
67. 243 Ga. at 561, 255 S.E.2d at 56.
68. 153 Ga. App. at 726, 266 S.E.2d at 361.
69. 151 Ga. App. 542, 260 S.E.2d 370 (1979), *petition for cert. filed.*

unearned premium within 15 days of notice of cancellation.[70] Does this require strict compliance in the sense that the insurer's tender *within the prescribed time limit* is a condition precedent to cancellation? In *Georgia Mutual Insurance Co. v. Fraser*[71] the insurer had properly mailed a notice of cancellation but had failed to make the required refund. It was held that the cancellation was ineffective and that the policy was still in force at the date of a loss which had occurred subsequently. Since no refund had been attempted *at any time* before the loss, the case is inconclusive on the question of strict compliance with the prescribed time limit.

E. Cooperation

Occasionally insurance contracts, such as homeowners' and automobile liability policies, to name but two striking examples, provide greater coverage than the average lay person expects. *State Farm Mutual Automobile Insurance Co. v. Sloan*[72] shows that this fact, which ought to be applauded as a boon to the consumer, may not be an unalloyed blessing. The undisputed facts showed that the insured carried two policies which covered his son as a member of his household under the "omnibus" clause. When his son was involved in a collision resulting in a wrongful death claim against him, the insured believed that his son was not covered because he was not specifically named as an insured in either policy and because the car he had been driving when he was involved in the collision did not belong to the father or the son and was not insured under any other policy. It simply did not occur to him that his son might be covered by his policies. Accordingly, the initial attorney of the insured informed the attorney representing the survivor in the wrongful death action that there was no insurance. About six months later the son contacted another attorney in connection with certain criminal proceedings, who, upon investigation, discovered that coverage existed under the insured's policies. This attorney notified the attorney representing the survivor, who in turn promptly notified the insurer of the wrongful death claim.

In determining whether the notice was received "as soon as practicable" as required by the cooperation clause in the policies, the court held as follows: *First,* the facts posed a question for the jury. The trial court could not *as a matter of law* summarily adjudicate that the six-month delay in giving the notice was or was not in compliance with the cooperation clause. *Second,* there was no requirement that the insurer show itself

70. GA. CODE ANN. § 56-2430 (1977).
71. 152 Ga. App. 866, 264 S.E.2d 315 (1980), *petition for cert. filed.*
72. 150 Ga. App. 464, 258 S.E.2d 146 (1979).

to be harmed by the delay as a condition precedent to denying coverage based on noncompliance with the cooperation clause. *Third,* the policy requirement that the notice "be given *by or on behalf* of the insured"[73] need only be substantially complied with. Thus it makes no difference whether the insured, or, as in this case, the opposing party-claimant's attorney gives the notice so long as it is reasonable and timely and the insurer obtains actual knowledge of the pendency of a claim or suit. *Fourth,* the precise wording of the cooperation clause must be scrutinized. Thus, clauses requiring "immediate" notice may compel different results from clauses requiring notice "as soon as practicable."[74]

F. Coverage — Duration

In *Wisener v. American Southern Insurance Co.,*[75] the plaintiff had purchased an automobile liability policy providing coverage for a six month period. The plaintiff had paid the premium for the original policy in full but then neglected to make any further payments for renewal coverage. Seven months after the expiration date plaintiff had a collision. Was he covered? It was held that the policy was automotically renewed on its expiration date because the plaintiff had never been notified that the insurer intended either to renew or not to renew the policy at the expiration of its original term.[76] It did not follow, however, that such renewal extended for all time at the insurer's expense. The court stated that while "the purpose of the automatic renewal provisions is to protect both the insured and the public from loss of coverge due to oversight,"[77] the legislature could hardly have intended such protection to be open-ended. Automatic renewal was meant to duplicate the terms of the original policy and to extend its coverage only for a like six month period.

In *Pennsylvania Millers Mutual Insurance Co. v. Dunlap,*[78] a homeowner's policy issued for three years provided coverage against loss occasioned by theft of unscheduled personal property in the amount of $10,000. It further provided that if the insurer elected not to renew the policy it would mail to the insured a timely nonrenewal notice. Instead of a nonrenewal notice, the insured received only a single declaration renewal sheet, which recited the unscheduled personal property coverage to the $10,000 amount in the exact language of the first policy, and an invoice, which she paid. It was established, however, that the insurer had

73. *Id.* at 465, 258 S.E.2d at 147.

74. The court distinguished *Sloan* from Atlanta Int'l Prop. v. Georgia Underwriting Ass'n., 149 Ga. App. 701, 256 S.E.2d 472 (1979), on this ground.

75. 150 Ga. App. 795, 258 S.E.2d 908 (1979).

76. *See* GA. CODE ANN. § 56-2430.1(c) (1977).

77. 150 Ga. App. at 795, 258 S.E.2d at 909.

78. 153 Ga. App. 116, 264 S.E.2d 483 (1980), *petition for cert. filed.*

sent an amended renewal declaration to its agent which incorporated an endorsement limiting recovery for theft of silverware to $1,000. Somehow the agent had not followed the usual custom of attaching this declaration sheet along with all the other endorsement forms to the policy and forwarding the entire "package policy" to the insured. It was held that the new theft endorsement had not become part of the renewal policy. Since she never received a nonrenewal notice apprising her of the insurer's intent not to renew the policy as originally written, the insured, upon receiving an incomplete communication in the form of a renewal declaration without attachments, and an invoice, could only conclude that the policy was renewed according to its original terms. It was frivolous for the insurer to contend that the insured was under a duty to examine the policy and was charged by law with knowledge of its coverage. The insured could hardly be expected to examine or suspect the existence of an endorsement which she had never received, particularly in light of the fact that the declaration she did receive was consistent on its face with the policy as originally written.

G. Exceptions and Exclusions

In *Cotton States Mutual Insurance Co. v. Crosby*,[79] a father filed suit against officials of a school district "alleging negligent breach of duty to safeguard school premises resulting in the attack and rape of his daughter in the bathroom of a junior high school."[80] Although the officials were insured against wrongful acts defined as "any . . . act or omission or neglect or breach of duty . . . in the discharge of school district duties,"[81] the insurer denied coverage relying upon an exclusion in the policy which stated that the policy did not apply to "any damages, direct or consequential, arising from bodily injury."[82] Despite the fact that the plaintiff sought compensation for bodily injury, mental anguish, and humiliation caused by the rape, the court of appeals held that the bodily injury exclusion was inapplicable because claims were ultimately bottomed upon the wrongful acts of the officials.[83] While the bodily injuries may have been the immediate cause of the harm, they were themselves but intermediate causes set into motion by the wrongful acts. It was therefore proper to characterize the claim for damages as arising from the officials' breach of

79. 244 Ga. 456, 260 S.E.2d 860 (1979).

80. *Id.* at 456, 260 S.E.2d at 861.

81. Cotton States Mut. Ins. Co. v. Crosby, 149 Ga. App. 450, 451, 254 S.E.2d 485, 486 (1979).

82. 244 Ga. at 456, 260 S.E.2d at 861.

83. 149 Ga. App. at 451, 254 S.E.2d at 487. *See* Pock, *Insurance, Annual Survey of Ga. Law*, 31 MERCER L. REV. 117, 125 (1979).

duty. The supreme court reversed,[84] indicating that the central flaw in this reasoning was the implicit assumption that the officials' neglect, standing alone, had created a cause of action. Legally there could have been no cause of action until their neglect eventuated in bodily injury. Hence, the plaintiff's cause of action was for damages, direct or consequential, arising from bodily injury explicitly within the compass of the exclusion.

H. Limitation in Policy-Time for Suit

Is a suit filed eighteen months after a loss timely under a policy which states, *inter alia,* that "no suit or action on this policy . . . shall be sustainable . . . unless commenced within twelve months next after inception of the loss" and that the "terms of this policy . . . which are in conflict with the statutes of this state wherein this policy is issued are hereby amended to conform to such statutes"?[85] The court in *Gravely v. Southern Trust Insurance Co.*[86] held that the one-year contractual limitation was not in conflict with the statutory six-year limitation for simple contracts[87] and hence was not displaced or amended by it. In order to have the longer statutory limitation displace the shorter contractual limitation it is necessary that the policy itself incorporate such statutory limitation by specific reference, as was done in *Queen Tufting Co. v. Fireman's Fund Insurance Co.,*[88] which involved a policy provision requiring that suit be commenced within twelve months "unless a longer period of time is provided by applicable statute."[89]

In *Smith v. State Farm Mutual Automobile Insurance Co.*[90] the court held that actions against no-fault insurers were governed by the statutory six-year limitation for simple contracts.[91] Because culpability is not an issue under the Motor Vehicle Accidents Reparation Act,[92] these actions against the insurer, as the real party defendant, are bottomed on the insurance contract even though the special injury upon which the no-fault claims are based may have been the product of a tort. Actions against uninsured motorist carriers are conceptually on a different footing. They are subject to the shorter statutory limitation for torts because uninsured

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84. 244 Ga. at 457, 260 S.E.2d at 861.

85. Gravely v. Southern Trust Ins. Co., 151 Ga. App. 93, 258 S.E.2d 753 (1979), *petition for cert. filed.*

86. *Id.*

87. GA. CODE ANN. § 3-705 (1975).

88. 239 Ga. 843, 239 S.E.2d 27 (1977).

89. 239 Ga. at 844, 239 S.E.2d at 28.

90. 152 Ga. App. 825, 264 S.E.2d 296 (1979), *petition for cert. filed.*

91. GA. CODE ANN. § 3-705 (1975).

92. *See* GA. CODE ANN. § 56-3401(b) (1977).

motorist coverage, unlike no-fault insurance, presupposes liability in tort and makes the insurer's liability purely *derivative*.[93]

The Georgia Code provides that if the defendant "shall have been guilty of fraud by which the plaintiff shall have been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud."[94] In *Lee v. All American Life & Casualty Co.*[95] an insured's widow, filing an action for disability payments as executrix, tried to justify a ten-year delay in bringing the complaint by invoking this provision. She claimed that the insurer's written denial of further liability for disability payments constituted fraud because it contained two sentences that were somewhat confusing. The court reiterated that in the absence of an established intent to deceive, the insurer's "statements of opinion as to the legal effect of the provisions of an insurance contract were not ordinarily actionable as fraud, there being *no fiduciary relationship* between the parties."[96] If the insured was not in any way prevented from ascertaining the provisions of his policy and if the insurer's letter, although somewhat confusing, was true, then a case for actionable fraud could not be made out and the period of limitation was not "tolled."

I. Loan Receipt

In *Hall v. Helms*,[97] an automobile owner collected from her collision insurer $1,611.14 ($1,711.14 minus the $100 deductible) for property damage caused to her car by one Hall, the operator of the other vehicle involved in the collision. The insurer then convinced Hall's insurance carrier that Hall had been negligent, collected $1,711.14, remitted $100 of this amount to the automobile owner insured and kept the remaining $1,611.14 in repayment of the loan receipt. The automobile owner then bought a tort action against Hall, alleging that her actual property damages were $4,250. A jury awarded her $2,300 as total damages, from which the trial court refused to write off the $1,711.14 previously paid by Hall's insurer and disbursed to the automobile owner through the loan receipt. The court of appeals held that the verdict should have been reduced by the previous payment. This reduction was not only required by the terms of the loan receipt which obligated the borrower-insured to repay the loan from such recovery as she might achieve by the prosecution of her claim against the tortfeasor, but also by the *indemnity* principle which denies a

93. Vaughn v. Collum, 236 Ga. 582, 224 S.E.2d 416 (1976).
94. GA. CODE ANN. § 3-807 (1975).
95. 153 Ga. App. 733, 266 S.E.2d 248 (1980).
96. 153 Ga. at 734, 266 S.E.2d at 249 (emphasis added).
97. 150 Ga. App. 257, 257 S.E.2d 349 (1979).

double recovery for a single injury.[98]

J. Subrogation and Contribution

A wrongdoer who accepts a release from an insured with knowledge of the insurer's subrogation rights does not cut off those rights. This is a principle of long standing and beguiling simplicity. It allows the insurer to have recourse to subrogation as though the release had never been executed.

Does it allow an insured who has given a release in violation of a loan receipt-subrogation agreement, prohibiting the insured from making any settlement with parties potentially liable for a certain casualty loss, to assert the ineffectiveness of the release and thus deny that the violation has ever occurred? Does it allow the wrongdoer who, with full knowledge of the existence of the agreement, has induced its breach and then accepted the release, to do the same?

The supreme court in *Allen v. Unigard Insurance Co.*[99] answered these questions with a resounding "no." Equitable subrogation as well as contractual-conventional subrogation furnishes a claim against the wrongdoer. This claim is protected against destruction through releases made deliberately with knowledge of its existence. This protection is equitable in origin and provides only a remedy to the party wronged—the insurer. "It was never intended as a vehicle in which the wrongdoer can ride to a haven of immunity"[100] and profit from his own wrong. Furthermore, subrogation against the wrongdoer, despite the release, is but a cumulative or additional remedy available to the insurer. It is not meant to substitute for the *contract* remedy against the insured for breach of the subrogation agreement or for the *torts* remedy against the wrongdoer for interfering with the agreement by inducing such breach.

In *Continental Insurance Co. v. Federal Insurance Co.*,[101] two fire insurers were present upon the same risk. Both policies in question contained identical "other insurance" or "pro rata" clauses which provided for the usual pro-rating in accordance with the respective policy limits. The first insurer paid the loss in full after the second had refused to contribute. Did the first insurer lose its entitlement to contribution when it paid more than its pro rata share on the well entrenched principle that restitution is unavailable to *volunteers* or *officious intermeddlers?* The court held that such overpayment and assumption of the responsibility

98. *See* GA. CODE ANN. § 105-2001 (1968).

99. 245 Ga. 475, 265 S.E.2d 774 (1980), *aff'g* Unigard Ins. Co. v. Zimmerman's, Inc., 151 Ga. App. 394, 259 S.E.2d 652 (1979).

100. 245 Ga. at 476, 265 S.E.2d at 775.

101. 153 Ga. App. 712, 266 S.E.2d 351 (1980), *petition for cert. filed.*

for full settlement did not place upon the first insurer the onus of being a *volunteer*. To deprive it of restitution in the form of contribution would create the undesirable situation of rewarding the co-insurer for refusing to honor its contractual obligations and of thwarting the sound public policy encouraging insurers to make swift settlement of claims. This policy is consonant with the recent thrust of authority in this country.[102]

K. Waiver and Estoppel

Antiwaiver clauses, while valid and binding, may themselves be waived by the insurer or the insurer may by vurtue of its own conduct become estopped from asserting them. The decision in *State Farm Fire & Casualty Co. v. Mills Plumbing Co.*[103] demonstrates that this rule, which is but a corollary of the principle that a party may dispense with an express condition intended for its benefit, is definitely part of Georgia law. A business entity, which had secured comprehensive liability insurance while a partnership, failed to notify its insurer that it had subsequently become incorporated although premium payments were thereafter made in the form of checks drawn on the new corporate account. Seven months after this metamorphosis, the insurer had an independent agency perform an audit on its insured to determine whether or not premiums should be adjusted. The audit revealed certain changes in business operations because of the incorporation which might affect the determination of future premiums. "These changes were reflected on the audit work sheets which, while not directly indicating that the figures were based upon the fact of incorporation, clearly designated that the audit had been *conducted on a corporate entity.*"[104] The insurer thereupon made an upward adjustment of the premiums. When a casualty occurred some time later the insurer denied liability, relying on a formidable array of policy conditions which included the usual provision that notice to or knowledge by agents would not effect a waiver of any part of the policy or work an estoppel against the insurer, and that all changes, particularly *assignments* of the policy, could be effected only by an endorsement issued to form part of the policy.

The court of appeals held that the change in the legal status of the insured, which otherwise continued its operations in the same manner as before, "did not, in the strictest sense of the word, introduce a 'stranger' to the risks insured against under the policy."[105] The insurer knew of the change in legal status through the audit reports. Instead of refunding the

102. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE 397, § 4913 (1942).
103. 152 Ga. App. 531, 263 S.E.2d 270 (1979), *petition for cert. filed.*
104. *Id.* (emphasis added).
105. 152 Ga. App. at 533, 263 S.E.2d at 272.

premiums to which by its own theory it was no longer entitled, the insurer retained the premiums and began accepting from the corporation the increased premiums which it had determined were due for the added risks involved in continued coverage. The insurer could not "run with the hares and hold with the hounds". It was *estopped* from denying coverage because it had, by its past actions, *elected* to treat the corporation as an assignee of the policy and had enjoyed the benefits of that election.

IV. Life, Health And Accident Insurance

A. *Designation of Beneficiary*

In *Watkins v. Davis*,[106] an interpleader action involving a purported change of beneficiary of a life insurance policy made by the insured in a signed document nineteen days prior to his suicide, the judge instructed the jury in pertinent part that "in order to void a change of beneficiary on the ground of mental incapacity . . . the person making the change must have been *non compos mentis*, that is, *entirely* without understanding, at the time the change was made."[107] It was contended that this charge was inconsistent with *Ison v. Geiger*,[108] in which the supreme court had held that for a contract to be valid, a party "must be possessed of mind and reason equal to a clear and full understanding of the nature and consequences of his or her act in making the contract."[109] If "full" understanding was the only *validating* condition, then it followed that anything less than "full" understanding was an *invalidating* condition. Hence, the charge had misstated the test when it required an entire lack of understanding as the test for invalidating.

It was held that the charge was nevertheless correct in light of the supreme court's earlier reconciliation of seemingly inconsistent formulations in its own opinions when it said that "one who has not the strength of mind and reason equal to a clear and full understanding of his act in making a contract is one who is afflicted with an *entire* loss of understanding."[110] The language of the charge and that of *Ison* were thus "opposite sides of the same coin" rather than extremes of a broad continuum as was contended.

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106. 152 Ga. App. 735, 263 S.E.2d 704 (1979).

107. *Id.* at 736-37, 263 S.E.2d at 706 (emphasis added).

108. 179 Ga. 798, 177 S.E. 596 (1934).

109. *Id.* at 799, 177 S.E. at 597.

110. 152 Ga. App. at 737, 263 S.E.2d at 706 (1979).

B. Group Insurance

In *Morrison Assurance Co., Inc. v. Armstrong*,[111] the insured received a participation certificate under a group insurance policy which provided coverage for lost wages and medical expenses. The certificate set forth certain limitations upon coverage which excluded in pertinent part benefits for "[O]ccupational injury or disease incurred in the course of working for an employer *other than the Group Policyholder*, who is subject to the Workmen's Compensation law. . . . "[112] Attached to this certificate was a cover letter in the form of a printed document evincing her coverage under the group policy and stating that the insurer and the employer as master policyholders "hereby agree that the policy is *amended* as follows: . . . . "[113] The text which followed contained an adjusted schedule of benefits payable to the specified insureds and their dependents.

When the insured was disabled during the course of her employment with the group policyholder, she submitted a claim based on the language of the certificate which clearly covered her. The insurer denied coverage in reliance upon the language of the master policy which excluded occupational injuries incurred in the course of working for *any* employer covered by workmen's compensation law. The court of appeals reluctantly held for the insurer because of the boiler-plate incorporation-by-reference clause in the certificate which provided that the insurance was "subject in every respect to the terms of the Policy, which alone constitutes the contract."[114] The plain effect of this clause was to have the master policy supersede conflicting terms in the certificate. This also disposed of the insured's argument that the cover letter received by her effected an amendment of the master policy. The cover letter only amended the schedule of benefits and not the entire policy, and the certificate, although attached to the cover letter, was not itself an "amendment" of the policy.

The court of appeals observed that justice was not well served by a rule of law which in a slot-machine fashion resolves conflicts between participation certificates and group master policies in favor of the latter and thereby eschews *contra proferentem* as a rule of construction and ignores the trend towards consumer protection now recognized in all areas of the law. Although it felt constrained to apply this harsh rule because of firm precedents, the court expressed the hope that it would eventually yield to remedial legislation.[115]

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111. 152 Ga. App. 885, 264 S.E.2d 320 (1980).
112. *Id.* at 886, 264 S.E.2d at 321.
113. *Id.* at 885, 264 S.E.2d at 321.
114. *Id.* at 888, 264 S.E.2d at 322.
115. Perhaps one way for the general assembly to avoid the "sledgehammer use of public

That group insurance disputes do not readily yield to the facile dispensations of agency law is again illustrated by cases such as *Rider v. Westinghouse Electric Corp.*[116] An employer had purchased a group occupational travel accident insurance policy covering all its employees save those whose principal job assignment was driving company-owned or leased motor vehicles. Once a year the employer informed each employee in a highly personalized statement of the particular "accrued benefits" package available to the employee, which varied according to tenure and salary. Each such communication advised the recipient to "take this statement home and review it with your family"[117] and was generally drafted in a style suitable to a concerned *paterfamilias*. Yet it did not reveal that there was any group policy covering any of the benefits described, or that the benefits were somehow subject to limitations and exclusions in such policy.

The employee was told that $25,000 in travel accident insurance would be paid in case of his accidental death while traveling on company business. When his widow filed an accidental death claim, she was told that the "$25,000" figure next to the printed designation of "Travel Accident Insurance" benefits was but a computer printout error which would not be controlling over the language of the group policy that specifically excluded her husband because his principal job assignment had been the operation of company vehicles. Did she have a claim against the insurer or, in the alternative, against the employer?

Although unable to reach a conclusionary determination because of issues of fact raised in the record, the court of appeals clarified a number of legal propositions in reversing and remanding the case in part.

First, absent specific indicia of an intended agency relationship, the employer is not an agent of the group insurer for purposes of informing the employee-beneficiaries of the contents of the policy.[118] If the employer as party to the insurance contract is to be classified as an agent at all rather than as an intermediary *sui juris* occupying a limited fiduciary status,[119] then it must be as an agent for its employees. The employer in seeking to obtain an inexpensive and yet comprehensive protection plan

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policy" is to come up with a statute which distinguishes between situations where the master policy is meant to supplement and clarify broad categories in the participation certificate, and situations where there exists a true conflict between the two documents. In the former, the consumer is put on notice that promising labels may have certain organic limitations too detailed to be spelled out in the certificate; in the latter, such notice is lacking, if one discounts the disingenuous "omnibus" clause which subjects all terms to the master policy. Only "true conflicts" need to be addressed.

116. 152 Ga. App. 805, 264 S.E.2d 276 (1979), *petition for cert. filed.*

117. *Id.* at 805, 264 S.E.2d at 278.

118. *Id.* at 807, 264 S.E.2d at 279.

119. *See generally* R. KEETON, BASIC TEXT ON INSURANCE LAW § 2.8(b) (1971).

for its employees is representing itself and those to be covered by the plan and not the insurer. The employer and not the insurer may thus become liable to the employees for misinforming them in regard to policy contents.

Second, even if the employer were treated as the insurer's agent, the insurer would not be liable in this case on any theory of implied waiver or estoppel because these doctrines are designed to dispense with conditions of liability but not to bring within the coverage of a policy risks that were originally beyond its terms.[120] One cannot readily "waive" oneself into a brand new obligation.

Third, documents, entire and complete unto themselves, by which the employer, in that capacity, seeks to inform its employees of the benefits to which they are entitled, without specifying the ultimate source, other than the fact of employment, from which those benefits are to derive,[121] become part of the employer's contractual obligation according to their terms. The employer may only avoid or limit such liability on a showing that its employees were afforded notice that the benefits represented were *otherwise qualified.*[122] The adequacy of such notice is generally a question for the jury.[123]

V. AUTOMOBILE AND LIABILITY INSURANCE

A. Defense-Liability Insurer's Obligation to Extend

In *Great American Insurance Co. v. McKemie,*[124] the supreme court clarified the liability insurer's contractual obligation to defend its insured by narrowing it. The insurer's obligation to defend is primarily delineated by the allegations asserted in the complaint against the insurer. If the allegations state a claim that is *formally* within the coverage, the insurer must defend the suit even if the "true" facts known show that the suit is groundless or outside the coverage. The reverse may also be true. If the allegations state a claim that is outside the coverage the insurer must defend the suit if the "true" facts known *at that time* reveal that the claim is within the coverage. However, the correctness of the insurer's decision to defend or not is determined by the information the insurer had at the *outset* when the decision was made. It cannot be determined by "later-revealed facts", such as a deposition injected into the case by a plaintiff

120. 152 Ga. App. at 808, 264 S.E.2d at 279, *quoting from* Ballinger v. C & S Bank, 139 Ga. App. 686, 689, 229 S.E.2d 498, 501 (1976).

121. *Id.* at 807, 264 S.E.2d at 279.

122. *Id.* at 811, 264 S.E.2d at 281 (emphasis added).

123. *Id.* at 811-12, 264 S.E.2d at 281.

124. 244 Ga. 84, 259 S.E.2d 39 (1979), *rev'g* McKemie v. Great Am. Ins. Co., 149 Ga. App. 19, 253 S.E.2d 399 (1979).

at a later state in the proceedings, of which the insurer had no notice at the time it refused to defend. Such "later-revealed facts" doctrine would compel the insurer to monitor the case throughout to be sure that its duty did not arise later. Such a burden would be "intolerable."[125]

Is an insurer estopped from claiming noncoverage if it does not obtain a reservation of rights agreement from the insured until more than two weeks *after* it assumes the defense of a suit against the insured? Not necessarily! In *Moody v. Pennsylvania Millers Mutual Insurance Co.*,[126] it was undisputed that the insureds had not notified the insurer of the existence of a personal injury suit against them until the last day on which defensive pleadings could be filed without default. The insurer immediately retained counsel and filed a timely answer but did not obtain a reservation of rights agreement until sixteen days later. The court held that the generally accepted rule—that if a liability insurer assumes and conducts the defense of an action brought against its insured with *actual* or *constructive* knowledge of a ground for forfeiture or noncoverage, the insurer is thereafter estopped from asserting such forfeiture or noncoverage unless it has entered upon the defense under a proper reservation of rights—was not applicable.[127]

No such estoppel resulted in this particular case since the insureds' delay in notifying the insurer of the suit had deprived the insurer of any opportunity to investigate the claim and make a meaningful decision as to coverage prior to filing a hurriedly drafted answer to avert a default.

B. No-Fault Insurance

Fifteen appellate cases attest to the fact that Georgia's Motor Vehicle Accidents Reparations Act, amended no less than thirteen times since its passage in 1974,[128] has remained reliably litigation-prone!

Its constitutionality was again upheld when the supreme court in *Teasley v. Mathis*[129] skewered the argument that the Act's disallowance of *exemplary* damages in litigation involving less than "serious injury" violated due process and equal protection because it resulted in an arbitrary exemption from the general policy of using exemplary damages to deter and punish wrongdoers for reckless conduct. The court held that such

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125. *Id.* The court of appeals opinion was premised on the theory that such duty could "spring up" at any time during such proceedings.

126. 152 Ga. App. 576, 263 S.E.2d 495 (1979).

127. *Id.* at 577, 263 S.E.2d at 496 (emphasis added) *citing* Continental Ins. Co. v. Weekes, 140 Ga. App. 791, 232 S.E.2d 80 (1976); Gant v. State Farm Mut. Auto. Ins. Co., 109 Ga. App. 41, 134 S.E.2d 886 (1964); State Farm Mut. Auto. Ins. Co. v. Anderson, 104 Ga. App. 815, 123 S.E.2d 191 (1961).

128. *See* GA. CODE ANN. § 56-34(b) (1977).

129. 243 Ga. 561, 255 S.E.2d 57 (1979).

disallowance was rationally related to the purpose of the no-fault statute, which is to eliminate wasteful litigation over moderate claims and to curb collateral litigation in order to expedite payments of such claims. It also held that the plaintiff's right of access to the courts and entitlement to a jury trial was no more impaired by the no-fault statute than it would be by any other enactment modifying or abrogating common law rights of action, a form of intervention which the legislative branch of government could constitutionally accomplish.[130]

Conflicts between no-fault legislation and another and older scheme for social insurance, the Workers' Compensation Act,[131] also clamored for disposition. While the no-fault law provides that benefits "shall not be reduced or eliminated by any workers' compensation benefits . . . ,"[132] the workers' compensation law provides that the "rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee . . . at common law or otherwise. . . . "[133] This has been interpreted consistently to mean that, where the workers' compensation law is applicable, it provides an *exclusive* remedy against the employer.[134] In light of this seeming conflict, what is the legal posture of an employee who was injured while driving his employer's tractor-trailer "rig" in the course of his employment and who received and continued to receive workers' compensation benefits from his employer? In *Freeman v. Ryder Truck Lines, Inc.*[135] the supreme court held that the later no-fault law did not repeal by implication the earlier workers' compensation law. The court took the position that the statutes could be readily reconciled. The employee, when making a claim against his own no-fault carrier covering his own vehicle, may collect in full without suffering any reduction because of collateral workers' compensation benefits received from his employer.[136] Yet, the employee cannot collect no-fault benefits under his employer's insurance, whose liability is limited to that mandated by the Workers' Compensation Act.[137] The court reasoned that the no-fault act "has no application to employers who are already obligated under Workmen's [sic] Compensation to their employees, and that No-Fault has neither changed that statutory obligation nor increased an employer's

130. 243 Ga. at 564, 255 S.E.2d at 58.

131. GA. CODE ANN. §§ 114-1 *et seq.* (Supp. 1980).

132. GA. CODE ANN. § 56-3409b(a) (Supp. 1979).

133. GA. CODE ANN. § 114-103 (Supp. 1980).

134. *See, e.g.*, Smith v. White Lift, Inc., 145 Ga. App. 596, 244 S.E.2d 117 (1978); Floyd v. McFolley, 131 Ga. App. 4, 205 S.E.2d 29 (1974).

135. 244 Ga. 80, 259 S.E.2d 36 (1979).

136. *Id.* at 83, 259 S.E.2d at 39. The court cited GA. CODE ANN. § 56-3407b(a) (Supp. 1980).

137. *Id.* The court cited GA. CODE ANN. § 114-103 (Supp. 1980).

burden to pay compensation for a favored class of employees."[138]

What is the legal posture of an employee who suffers a work-related injury while occupying her employer's car as a passenger if it transpires that the employer, although required to do so, had purchased no workers' compensation insurance but had purchased no-fault insurance on the vehicle involved in the accident in question? The court in *Fox v. Stanish*[139] held that the employee was barred from any remedy except that provided by the workers' compensation law. This necessarily meant that the employee could not bring an action in tort against the employer, nor require payments under the liability provisions of the no-fault act, although she could treat him as a self-insurer and file a claim under the act, as well as seek a penalty and attorney fees. Her predicament was not altered by the fact that her employer had chosen not to carry worker's compensation coverage.

What is the legal posture of an owner-operator who does not carry no-fault insurance or who, although carrying the required no-fault insurance, has failed for whatever reason to recover no-fault benefits from his own insurer? May he recover in tort, from the other operator, that part of his economic loss for which no-fault economic loss benefits may have been *technically* available[140] but were not *actually* recovered? In *Davidson v. Bradford*,[141] the supreme court held that this question was plainly answered by the no-fault act which imposes upon owners of motor vehicles required to be registered in Georgia, a *mandatory* duty to secure minimum insurance coverage[142] and then precludes such owners from recovering from tortfeasors in damages those economic loss benefits to which they are *eligible* and which are *available* under the no-fault act.[143] Eligibility in a legal sense, and not actual receipt of no-fault benefits, thus emerges as the touchstone of the tortfeasor's suability for damages from economic loss. It is to be noted that earlier decisions by the court of appeals which held that *non-owner operators* and *passengers* could recover no-fault economic benefits losses against tortfeasors[144] are unaffected by the decision in *Davidson*. The supreme court held that the earlier decisions were distinguishable from the case *sub judice* because they involved

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138. 244 Ga. at 83, 259 S.E.2d at 39, *quoting from* IML Fright, Inc. v. Ottosen, 538 P.2d 296, 297 (Utah 1975). The favored class would be those employees fortunate enough to be driving the employer's vehicle rather than their own.

139. 150 Ga. App. 537, 258 S.E.2d 190 (1979).

140. GA. CODE ANN. § 56-3403(b) (1977).

141. 245 Ga. 8, 262 S.E.2d 780 (1980), *rev'g* Davidson v. Bradford, 150 Ga. App. 625, 258 S.E.2d 235 (1979).

142. GA. CODE ANN. § 56-3403(b) (1977).

143. GA. CODE ANN. § 56-3410b(b) (1977).

144. Jenkins v. Vaughn, 146 Ga. App. 801, 247 S.E.2d 485 (1978), and Eidson v. Reagin, 146 Ga. App. 814, 247 S.E.2d 486 (1978).

accident victims who were not required to carry no-fault insurance and who were placed in a position where they could not control whether the vehicles in which they were riding were properly insured under the law.[145]

It is accepted that statutory provisions enter into and form a part of all contracts of insurance to which they are applicable, and that in case of conflict between an insurance policy and a statutory provision the latter controls.[146] Practically, this principle comes into play when insurers introduce coverage provisions that are more restricted, and exclusions that are more inclusive than the statute seems to allow. In *State Farm Mutual Automobile Insurance Co. v. Landskroener,*[147] a no-fault policy excluded from coverage "bodily injury sustained by any person while operating . . . a motor vehicle owned by the named insured *or any relative* . . . and such vehicle is not an insured vehicle."[148]

The no-fault act provided only an exclusion from coverage of persons who sustained accidental bodily injury ". . . while occupying a motor vehicle owned *by such person* which is not insured . . . "[149] Was a wife covered under her own no-fault policy while driving her husband's uninsured automobile? The court held that she was covered because the exclusion in the policy was broader than that permitted by the statute which plainly excluded coverage only as to persons who were occupying their *own* uninsured vehicles and not uninsured vehicles owned by relatives.[150]

The no-fault act provides that the term "insured" shall include, in addition to the named insured, "his spouse and children if residing in the same household, the relatives of either . . . , any pedestrian struck by the insured vehicle, and any other person using or occupying the insured vehicle with the express or implied permission of the named insured or his spouse."[151] May a liability insurer exclude one or more of the enumerated classes of persons from its definition of "insured"? In *Allstate Insurance Co. v. Skinner*[152] the supreme court held that it may do so, but only in regard to the *liability* portion of the no-fault policy. In regard to the personal injury protection ("PIP") provisions or *no-fault* portion of the policy it must extend coverage to all those who are defined as "insured"

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145. 245 Ga. at 11-12, 26 S.E.2d at 783.

146. State Farm Mut. Auto. Ins. Co. v. Landskroener, 150 Ga. App. 308, 309, 257 S.E.2d 376, 378 (1979), *quoting from* Nelson v. Southern Guar. Ins. Co., 221 Ga. 804, 807, 147 S.E.2d 424, 426 (1966), *citing* Employers Liab. Assurance Corp. v. Hunter, 184 Ga. 196, 202, 190 S.E. 598, 601 (1937).

147. 150 Ga. App. at 308, 257 S.E.2d at 376.

148. *Id.*, 257 S.E.2d at 377.

149. *Id.* at 309, 257 S.E.2d at 377 (emphasis in original).

150. *Id.*

151. GA. CODE ANN. § 56-3402b(b) (1977).

152. 150 Ga. App. 106, 257 S.E.2d 4 (1979) *petition for cert. filed.*

under the statute.[153]

In *Georgia Farm Bureau Mutual Insurance Co. v. Musgrove*[154] the operator of a farm tractor was seriously injured in a collision with a truck. The owner of the tractor had no less than three policies insuring the tractor, each providing for $5000 *basic* no-fault benefits and $5000 *additional* no-fault benefits. Was he entitled to recover $15,000 in *additional* benefits by collecting all three policies? It was held that such "stacking" was prohibited by a provision found in all three policies which stated that "regardless of the number of persons insured, policies, or bonds applicable . . . , liability for additional personal injury protection benefits with respect to bodily injury sustained by any one eligible injured person in any one motor vehicle acident shall not exceed *in the aggregate* the amount set forth in the Declaration."[155] The court concluded that this provision was authorized by the no-fault act which states that "the total benefits required to be paid . . . shall not exceed the sum of $5000 per each individual covered . . . or such *greater amount of coverage as has been purchased on an optional basis* . . . regardless of the number of insurers providing such benefits or of the number of policies providing such coverage."[156] The effect of the policy provision was to limit recovery to the highest amount of additional PIP purchased on any one policy. For example, if the insured had two policies, one with $10,000 additional PIP, and one with $5000 additional PIP, he would recover up to $10,000 but not up to $15,000. Since all three policies here were for $5000 additional PIP, his recovery was correspondingly limited to $5000.

What is the insurer's liability under the basic PIP which requires "compensation . . . up to an aggregate minimum limit of $5000 . . . for . . . 85 per cent of the loss of income or earnings during disability with a maximum benefit of $200 per week . . . "?[157] Two cases addressed themselves to this question. In *Georgia Farm Bureau Mutual Insurance Co. v. Nelson*,[158] the insurer contended that its liability for lost earnings was limited to $1,000, apparently on the ingenious assumption that the statutory limit on necessary medical expenses ($2,500) and on funeral services and burial expenses ($1,500) amounted to $4,000, which left only $1,000 for lost earnings. It was held that the *only* limit on lost earnings was the aggregate limit of $5,000. The difference between $5,000 and the amounts

153. *Id.* at 107, 257 S.E.2d at 5. It is difficult to see how it can be argued that GA. CODE ANN. § 56-3403b(a) does not impose a mandatory coverage requirement on the liability portion of the policy as well.

154. 153 Ga. App. 690, 266 S.E.2d 228 (1980), *petition for cert. filed.*

155. *Id.* at 691, 266 S.E.2d at 229 (emphasis different from original).

156. GA. CODE ANN. § 56-3402b(i) (1977).

157. GA. CODE ANN. § 56-3403b(b)(2) (1977).

158. 153 Ga. App. 623, 266 S.E.2d 299 (1980), *petition for cert. filed.*

actually paid for medical and funeral expenses, which may be considerably less than the $4,000 maximum, was thus available to indemnify the insured for lost earnings.

In *Smith v. State Farm Mutual Automobile Insurance Co.*,[159] the insured was injured and her husband killed in an automobile collision. According to the insured's affidavit she had been supplying full time bookkeeping and clerical services to her husband, in his capacity as head and sole proprietor of an accounting firm, prior to the accident. While she did not receive direct compensation in the form of a salary for services rendered, she did have the full use, enjoyment and benefit of a portion of the net profits of the business as compensation for her participation therein. The income from the business, which was partially generated by the insured's saving the expense of having to hire other help, was deposited to the joint account of the spouses. Some part of that income belonged to the insured and she had access to it on a regular basis. The court held that "income or earnings" was not limited to salaries and wages but included profits of a business generated through the labor of an insured without substantial assistance by others. In light of the facts deposed, it was error to grant a summary judgment in favor of the insurer.

In *Clinton v. National Indemnity Co.*,[160] a volunteer fireman went to the scene of a fire where another fireman had brought a municipal fire truck. After the other fireman unwound the hose, the volunteer fireman held the hose at the nozzle and sprayed water on a gas tank to keep it from overheating. The volunteer fireman then signaled that he needed to readjust the hose to reach another tank. The operator of the truck turned off the water pressure and for some reason the hose jerked and snaked loose, throwing the volunteer fireman to the ground and injuring him. Was the volunteer fireman covered under the no-fault policy covering the fire truck? The court held that he was not. To be covered, his accidental injury must have been sustained either while occupying the motor vehicle or while, as a pedestrian, he was struck by it.[161] He was not "occupying" the vehicle in the sense of *being in or on the motor vehicle or engaged in the immediate act of entering or alighting from it* as provided by statute.[162] The volunteer fireman had not entered the fire truck, except to get up on the backboard plate, loosen the hose nozzle, pull the hose off, and to go around to the back of the burning mobile home with it."[163] Nor was he injured by being *struck by the motor vehicle while a pedestrian.*[164]

159. 152 Ga. App. 825, 264 S.E.2d 296 (1979), *petition for cert. filed.*
160. 153 Ga. App. 491, 265 S.E.2d 841 (1980).
161. *See* GA. CODE ANN. § 56-3407 (Supp. 1980).
162. GA. CODE ANN. § 56-3402b(i) (1977) (emphasis added).
163. 153 Ga. at 494, 265 S.E.2d at 842.
164. *See* GA. CODE ANN. § 56-3402b(b) (1977).

Technically speaking, his injury resulted from a pressure change in the water hose as the water container in the truck was being "unloaded" through the medium of the pump. Unfortunately, conduct in the course of loading and unloading a motor vehicle is expressly excluded from coverage "unless the conduct occurs while occupying it."[165]

C. *Omnibus Clause*

The omnibus clause in an automobile insurance policy defined the word "insured" as including " . . . any other person while using the owned motor vehicle, provided the *operation and the actual use* of such vehicle are with the permission of the named insured or such spouse and are *within the scope* of such permission."[166] How did this language affect the recurring situation of an authorized user allowing another person to drive the automobile — the case of the permittee's permittee? In *DeWorken v. State Farm Mutual Insurance Co.*,[167] the named insured and owner of an automobile gave special permission to his son Mike to drive the automobile for an evening. Mike, accompanied by one Underwood, drove the car to his girlfriend's house and, when he found out that she would be unable to leave home that night, decided to stay at her home and loaned the car to Underwood. An accident occurred later that night when Underwood was returning to pick up Mike. There was a standing policy, communicated to Mike and Underwood and never violated previously, that no one outside of the family was to operate the automobile. The court held that since there was no evidence of express or implied permission, coverage was plainly precluded by the particular wording of the policy which stipulated that *both the operation and the actual use* had to be within the scope of the permission granted.[168]

The court distinguished *Strickland v. Georgia Casualty & Insurance Co.*[169] which dealt with the omnibus clause found in the 1955 standard automobile policy.[170] This clause covers "any person while using the automobile . . . provided the *actual use* of the automobile is by the named insured or such spouse or with the permission of either."[171] In *Strickland*, the court drew a distinction between *operation* of an automobile, in its

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165. GA. CODE ANN. § 56-3402b(h) (1977).

166. DeWorken v. State Farm Mut. Auto Ins. Co., 151 Ga. App. 248, 249, 259 S.E.2d 490, 492 (1979) (emphasis different from original).

167. 151 Ga. App. at 248, 259 S.E.2d at 490, *petition for cert. filed.*

168. *Id.* at 249, 259 S.E.2d at 492.

169. 224 Ga. 487, 162 S.E.2d 421 (1968). For a discussion of this case, see Pock, *Insurance, Annual Survey of Ga. Law*, 21 MERCER L. REV. 167, 170 (1969).

170. J. AUSTIN & N. RISJORD, AUTOMOBILE LIABILITY INSURANCE CASES Standard Provisions and app. 19 (1964).

171. 225 Ga. at 488, 162 S.E.2d at 423.

narrow signification of driving it, and *use* of an automobile, in its broad signification of employing it for a particular purpose, such as a specific trip. If the *actual use* by the permittee was authorized then it mattered not that the mode of operation was unauthorized. The permittee's permittee was covered!

It is interesting and not at all otiose to speculate just how the restrictive language of the 1966 standard automobile policy[172] would fare under the *DeWorken-Strickland* line of authority. It covers "any other person using such automobile with the permission of the named insured, provided his *actual operation* or (if he is not operating) his other *actual use* thereof is within the scope of such permission."[173] It is probable that, despite the difference in wording, the result would be the same as in *DeWorken.* Underwood would have to prove *either* that his actual operation was within the scope of permission *or* that his actual use was within the scope of permission. Since he could prove neither, he would not be covered.[174]

D. Uninsured Motorist Coverage

The macabre facts of *American Protection Insurance Co. v. Parker,*[175] a case of first impression, have a certain bloodcurdling quality even to those who imagine themselves quite unflappable! The plaintiff, while occupying the car she owned, had allowed her "friend" to take the wheel. When the "friend" stopped in an insolated area other than that to which permission extended, plaintiff remonstrated and reached out to the ignition switch, whereupon the "friend" attacked and stabbed her. She twice escaped from the car, but was twice recaptured and beaten. The "friend" then placed plaintiff, while in a semi-conscious condition, on the road behind the car, placed the vehicle in reverse and ran over her body, then put the car in gear driving the wheels over her body a second time and made his escape, leaving her for dead. The plaintiff sustained serious injuries. Was this attempted murder covered under the uninsured motorist rider of her liability policy?

In holding that plaintiff was indeed covered, the court reasoned as fol-

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172. R. KEETON, BASIC TEXT ON INSURANCE LAW app. H (1971).

173. *Id.*

174. In fact it is doubtful whether Underwood would have recovered under the broad language of the 1955 standard automobile policy involved in *Strickland.* A fair reading of the case suggests that he would have to show *either* that he was operating the car while Mike, the original permittee, was in the car with him *or* that, although Mike was not in the car with him, he was somehow serving a purpose of Mike, such as running an errand for him. It is difficult to visualize just how Underwood was advancing any of Mike's purposes when he used the car on a frolic of his own.

175. 150 Ga. App. 732, 258 S.E.2d 540 (1979), *petition for cert. filed.*

lows: *First,* her injuries were caused by *accident* in the sense that the occurrence causing the injuries was unforeseen, unusual, and unexpected when viewed through plaintiff's eyes — the optic of the victim and not that of the tortfeasor. *Second,* the automobile which struck her was *uninsured* under the language of the insuring agreement, which specifically defines *uninsured automobile* "as one with respect to the ownership or use of which there is no bodily injury insurance *applicable at the time of the accident*"[176] and excludes from the definition of *insured automobile* "any automobile while being used without the permission of the owner."[177] *Third,* the standard exclusion providing that the uninsured motorist coverage "does not apply . . . to bodily injury to an insured while occupying an automobile (other than the insured automobile) owned by the named insured or a relative, or through being struck by such automobile"[178] was irrelevant to her case. This exclusion was designed for and makes sense only in the frequently arising garden-variety situation where the named insured or resident relative covered by the policy owns an uninsured automobile also, and these cars collide. Excluding coverage in such situation simply prevents automobile owners from insuring a fleet of cars for the price of insuring a single car. The language of the exclusion thus yields to ready reconciliation with the definition of uninsured automobiles. Yet even if, *arguendo,* such reconciliation were impossible, application of *contra proferentem* to ambiguities in contracts of adhesion would still save the day for the plaintiff.

Can a person who at the time of an automobile collision has extant a liability policy be treated as an *uninsured* motorist because he absconds after the collision and cannot be found for service? The court in *Smith v. Commercial Union Assurance Co.*[179] held that such post-event concealment did not alter the tortfeasor's status as an insured motorist. The fact that the Georgia Code allows a John Doe action against an unknown tortfeasor *"whether he is insured or not,"*[180] does not mean that a tortfeasor whose name is known but who conceals his location for purposes of service should be considered an uninsured motorist whether he is insured or not. The Georgia Code merely creates a *presumption* that the unknown motorist is uninsured.[181] This presumption cannot apply where the motorist is known *and* known to be insured.[182]

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176. *Id.* at 734, 258 S.E.2d at 542 (emphasis in original).

177. *Id.*

178. *Id.* at 735, 258 S.E.2d at 543.

179. 153 Ga. App. 38, 264 S.E.2d 530 (1980), *petition for cert. filed.*

180. *Id.* at 39, 264 S.E.2d at 531. The court was paraphrasing GA. CODE ANN. § 56-407.1(b) and (d) (1977).

181. 153 Ga. App. at 39, 264 S.E.2d at 532.

182. *Id.* The court suggested that the general assembly adopt remedial legislation on this

VI. PROPERTY INSURANCE

A. *Standard or Union Mortgage Clause*

In *Federal National Mortgage Association v. Hanover Insurance Co.*,[183] a mortgage-loss payee under a fire policy covering an owner-occupied dwelling was required by the terms of the policy to notify the insurer "of any change of ownership . . . which shall come to the knowledge of said mortgagee."[184]

Was the mortgagee required to notify the insurer of the "change of ownership" which occurred when it bought the property after exercising the power in the security deed upon default of the owner? The supreme court held that no notification was required. The result of such proceedings was merely an enlargement or increase of the mortgagee's original interest in the property rather than a "change of ownership" within the intent of the notice requirement. Any other construction would eviscerate the standard provision that "this insurance . . . shall not be invalidated by any . . . foreclosure or other proceedings or notice of sale relating to the property."[185] This provision is plainly meant for the protection of the mortgagee-loss payee as a third party beneficiary, who thus retains its insurable interest and continues as an insured under the policy.

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point.

183. 243 Ga. 609, 255 S.E.2d 685 (1979), *rev'g* Hanover Ins. Co. v. Federal Nat'l Mortgage Ass'n, 147 Ga. App. 573, 249 S.E.2d 626 (1978).

184. *Id.* at 610, 255 S.E.2d at 685.

185. *Id.* 255 S.E.2d at 685, quoting from the policy at issue.